UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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NARL REFINING LIMITED PARTNERSHIP,

Plaintiff,

v.

16 CV 404(RA)

BP Products North America, Inc.,

Defendant.

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January 29, 2016

2:19 p.m.

Before:

HON. RONNIE ABRAMS,

District Judge

APPEARANCES

KING & SPALDING
Attorneys for Plaintiff
BY: BOBBY R. BURCHFIELD
MATTHEW M. LELAND

HERBERT SMITH FREEHILLS
Attorneys for Defendant
BY: SCOTT S. BALBER
LAURENCE SHORE
CHRISTIAN LEATHLEY

(Case called)

THE DEPUTY CLERK: Counsel, please state your name for the record.

MR. BURCHFIELD: Good afternoon, your Honor. Bobby Burchfield and my partner, Matthew Leland, from King & Spalding on behalf of the plaintiff NARL Refinery Partnership.

THE COURT: Good afternoon to both of you.

MR. BALBER: Good afternoon, your Honor. Scott Balber from Herbert Smith Freehills on behalf of BP. And with me are my colleagues, Laurence Shore and Christian Leathley.

THE COURT: Good afternoon to all of you as well.

So I want to do two things at this conference. First, I'd just really like to hear out the parties' positions generally. This is not intended to be an oral argument by any means, but just to hear you out generally. And then I really want to set a schedule for a response to the motion for the preliminary injunction and talk about scheduling, all right?

So, Mr. Burchfield?

MR. BURCHFIELD: Thank you, your Honor.

The narrow issue in this case is whether BP should be enjoined from terminating, interrupting or suspending its performance under the contract. We refer to it as the crude PSA, which is attached to the complaint. As your Honor knows, under that contract BP is the exclusive supplier of crude oil to my client's refinery, and it is the principal purchaser of refined products from that refinery. If it does interrupt, suspend or terminate that contract, my client cannot remain in business. And that has significant effects not only for my client, for the local economy up in Newfoundland -- the refinery employs almost 500 people and at least 200 other contractors depend on it for employment. The local economy depends on it for fuel oil, among other products, during this winter season. So any interruption of crude supply or any interruption of picking up the products, which would create an inventory storage space for my client, would essentially interrupt the ability of the business to continue.

The more fundamental issues of the breach of contract are pending before an arbitration, before the American Arbitration Association right now. The arbiter panel is --

THE COURT: What's the status?

MR. BURCHFIELD: The parties have agreed conditionally to a procedure where each party will nominate an arbitrator, and those two arbitrators will then choose the chair of the arbitration tribunal. Both parties have submitted nominations. The AAA is vetting those nominations right now. We are expecting to hear from the AAA and get a conflict form from the AAA maybe in the next two days. The arbitrators will then have to be impaneled, those two, and then they will have to agree upon a chair. The same process for vetting that arbitrator, the chair arbitrator, will need to go through.

So we're talking probably a few weeks before the arbitration panel can be seated.

THE COURT: Okay. And do you have any application with respect to the timing of the PI hearing?

MR. BURCHFIELD: Your Honor, we believe we would like to have the hearing as quickly as the Court's schedule permits. As you know from reading our papers, BP has threatened to either terminate the contract or suspend performance four times. And within the last month it is purported to declare force majeure and claimed it was going to refuse to pick up product. Those threats have to be taken seriously. And we want some clarification that the contract is going to remain in effect while the AAA panel does its business.

So we would like to have the hearing very quickly, and an understanding that pending that hearing, the parties will continue to perform their obligations under the contract.

THE COURT: Do you think any discovery is necessary in advance of the hearing?

MR. BURCHFIELD: Your Honor, we would probably like to take the deposition of two or three people.

The issues here are narrow. This does not implicate the entire breach of contract action, which is pending before the AAA, which I'm sure we'll do a fine job of resolving those issues.

So the only issues as we see them here are whether there really is imminent irreparable harm in the event of a suspension or termination of performance and whether there is a likelihood of my client prevailing on the merits that it's got it that there is a threat that the contract is going to be suspended or terminated. Those are two very discrete issues, so we think any discovery would be very narrow.

THE COURT: Okay. Thank you.

MR. BALBER: Thank you, your Honor.

I'd like to, in addition, give you an overview of the case, try to dissuade you from going down this road at all.

THE COURT: And by "this road" you mean by even having a hearing?

MR. BALBER: By "this road," I mean briefing; I mean hearing; I mean all of it. Let me explain why.

THE COURT: Okay.

MR. BALBER: They are both too late and too early. They claim in their papers that we started threatening them to terminate the contract back in April. They claim we threatened them again in August; again, in December.

Now, over the course of this nine-month period we haven't terminated the contract. But if they were so concerned about the imminency of our alleged threats, I queried why they've waited nine months to seek relief from the Court. The answer to that is it is litigation tactics vis-a-vis the arbitration that we commenced in December 2015. And not only have they brought this proceeding in this court, in addition to the arbitration we filed, they've brought a separate proceeding in the Southern District of Texas, claiming tortious interference with the contract, based on, guess what, those very same letters that they've appended to the preliminary injunction application.

Now, we steadfastly denied that we threatened to terminate the contract. Your Honor can read the letters for yourself. We reserved our rights. We haven't taken any action. But even if we did, your Honor, why are we doing this now? If your Honor were to decide I will not sign this order to show cause, I'll deny this order to show cause, they have leave to refile their application anytime they want. If BP decides on Monday that they're going to terminate the contract, I have no doubt Mr. Burchfield will get an audience with this Court for us to come back and set a briefing schedule on what is not a speculative or hypothetical termination but an actual termination.

THE COURT: Well, would you be willing to consent or reach any kind of agreement essentially to continue to supply the refinery while the arbitration is pending?

MR. BALBER: Let me tell you the problem with that, your Honor. The short answer, as I've said, we have no intention of terminating, period. But let me tell you the problem with the suggestion your Honor is making. There are actually three parties involved in this relationship. Citi is another -- Citi is another entity that provides financing to the refinery and has liens over the various assets, etc.

So here are the problems I see with us agreeing to maintain the contract. What happens if NARL fails to perform? What will be our remedy? What happens, your Honor, and the way the contract is structured, we provide the crude and they provide back to us the refined petroleum products. So what happens if we agree to this injunction or agree to a stipulation where we provide the crude and they decide not to provide the oil back to us, the refined oil? Do I have to then run into court to get relief? What if they stop paying us? What if Citi decides that the risk to Citi, a nonparty to this action, is too great and they assert their contractual rights? Do I need to continue to provide crude oil on a daily basis, 100,000 barrels a day in this period of uncertainty? I don't want to ask your Honor a question in response to your question, but it depends on what your Honor is looking for. It depends on whether they're willing to post a bond sufficient to secure and protect our interests during the pendency of whatever injunction or stipulation we put in place. So it's complicated, your Honor.

And the last piece of it is they threatened -- they indicate that we took advantage of a force majeure clause in December because there was storms in Houston. We couldn't deliver the oil on time. They claim that was some anticipatory breach. We disagree. The facts will be what they are. But what happens if there's another storm or another political event or some other catastrophe? Are we going to be in contempt because we can't deliver the oil on the day at the time and the terms of the contract?

So this is all the question of why we are doing this now, when these gentlemen have -- I don't know if either one is admitted in New York, but they have a New York office. And if any issue comes up that requires the Court's immediate attention, they can come back with a TRO. And I suspect your Honor will demand me in court immediately to answer questions as to why we've breached, why we've terminated and why you shouldn't set an immediate scheduling for briefing and for oral argument.

But all we've done now is they've claimed they sent in letters, which your Honor can read, as long ago as nine months ago. So we're going to have this briefing schedule, depositions, a preliminary injunction hearing based upon some threat that began nine months ago, if you even interpret it that way, that we've never acted on.

So why now? And of course, your Honor, we steadfastly contest their claim of irreparable harm. What is going to happen if it were the case that Monday morning BP says, you know what, Mr. Balber, what we told you on Friday, we've changed our mind. We are terminating. What's going to happen? They will come and get a TRO. They have the ability to seek money damages. How is anybody hurt? Where is the fire?

So if it were not for the pending arbitration, if it were not for the pending proceeding in the Southern District of Texas that they commenced against BP over these same issues, I might have a different view. But to undertake this road based on some speculative, hypothetical circumstance where there's no actual harm that can't be remedied by money damages? So that's the set of affairs, your Honor.

Lastly, they claim that the people of Newfoundland are going to suffer grave consequences in the event that we stop delivering oil. Where is an affidavit from the Premier of Newfoundland? There have been two circumstances over the last five years where that refinery was shut down for 70 days in 2010. The people of Newfoundland survived, and just this last February there was a threatened strike at the plant by those 500 workers. There was no injunction. There was no parade of horribles referenced in the newspaper. There was nothing.

This is about gamesmanship, your Honor, and nothing else, and your Honor should not countenance it. And if you need to, we can come back anytime and you can deal with it at that time.

Thank you, Judge.

THE COURT: Look, first of all, let me ask plaintiff in response: Is plaintiff willing to put up a bond? And if so, you know, how much?

MR. BURCHFIELD: Your Honor, in our view a bond is not necessary to get them to do what they're contractually obligated to do. I'm not hearing clearly from counsel whether BP is committing to the Court that they're not going to terminate or suspend.

THE COURT: Isn't it speculative at this point? Or is it? I mean, I don't have a response yet, so it's hard for me to judge here sitting here today. But is it speculative as to whether or not they're not going to continue to fulfill their obligations?

MR. BURCHFIELD: Well, your Honor, they continue to threaten to do it. If they're to be believed, then there is an imminent threat and the consequences of them doing it, as we set forth in our affidavit, in Mr. Amin's affidavit, would be devastating to the refinery and devastating to the local economy. I don't know what the situation was there in 2010, but the affidavit indicates that currently this refinery is supplying winter fuel oil. I believe the number is 40 truckloads a day to the local economy up there. And there are people employed by the refinery, so shutting this down would be serious irreparable harm.

Now, counsel suggests that, how are they protected if my client takes the crude oil and won't sell them back the refined oil? We've got no choice. There's no other buyer for it. If we take the crude oil and refine it, we only have limited space, which is one of the reasons that we need them to continue picking it up. The notion that my client is going to breach this contract when it has never threatened to do so, when it has never done anything that puts an imminent threat of breach, that seems to me to be highly, highly, highly speculative.

Here we have a situation where BP has, in fact, threatened on four occasions and declared force majeure on two others without basis. And we're in a position where if they're going to continue performing the contract, then they should so stipulate before the Court. If they're not willing to make that stipulation, then let's have a hearing and determine whether we've got good grounds to suspect that they may terminate the contract.

MR. BALBER: Two things I actually need to read to your Honor.

THE COURT: Okay.

MR. BALBER: To read to your Honor from the papers that have been submitted in this case in the arbitration.

Thing one is Exhibit H to their application, which is the last letter dated December 31, 2015, from BP to NARL. It's in your Honor's papers, but I want to read the sentence -- this is the last sentence of the letter:

THE COURT: Sorry. Where are you reading from?

MR. BALBER: This is Exhibit H, I'm sorry, which is the December 31st letter. I'll let your Honor find it, if you want a moment.

THE COURT: Yes. Go ahead.

MR. BALBER: First sentence of the last paragraph. The actions referenced above clearly demonstrate that BP remains committed to meeting its obligations.

That's one of the letters that they are using -- the most recent one I might add -- that they're using for the predicate for their claim that we're going to terminate the contract, that one.

The second thing I need to read to you is something which they conveniently didn't attach to their papers. And that is their answer and counterclaim in the arbitration. We have copies for the Court, if you want, but I will read to you the first prayer for relief; NARL, not BP. What they seek is, quote, equitable termination of the crude PSA, the contract, after 90 days' notice and an opportunity for NH to make arrangements for alternative supplies of crude oil, etc. The only party in this room that has claimed or sought to terminate the contract is them. Is them. In their proceeding in the arbitration. And they're asking your Honor to brief the question of whether we should be enjoined from terminating when that's the relief they're seeking in the arbitration?

MR. BURCHFIELD: Your Honor, counsel interrupted me before I was finished. Let me respond directly to that point.

He read you the correct passage. My client does not have confidence that BP is going to continue performing this contract. And we do want equitable termination in the arbitration, but with 90 days' notice, which is exactly what we plead here is the amount of time it would take my client to get to get an alternative supplier and alternative purchaser. That is completely consistent with our position here.

Counsel also read about BP's protest after they had threatened to suspend and terminate the contract, that they at that moment were not intending to. And they subsequently declared force majeure twice within the last month. And only when my client wrote back sternly and told them there was no basis for it, that the ship they claimed was fogged into Houston harbor was really in New York harbor, did they relent on that demand.

The point here, your Honor, is that BP has engaged in a course of conduct where they have repeatedly failed to provide adequate assurances under the UCC to my client, which is under New York UCC a breach of their obligations. And it's an anticipatory repudiation of the contract. We are entitled to those assurances. And they have refused to give those assurances.

What we're asking the Court to do is to allow us to come in and prove that there is a serious risk to my client that they're going to terminate the contract.

He mentioned the Houston action, if you want to hear about that. Your Honor, that action does not involve this contract. Counsel misspoke. That involves a contract that my client has for financing with Citigroup Energy Canada. We allege in the Houston action that they have not only directly interfered by going to CEC directly, but they've also through these letters and others demanded that CEC cease negotiations with us and also not -- shall exercise its contract rights to cut off our finance. So that's a completely different action than this.

What we're asking here is just for peace of mind that this contract is going to run its course while the arbitration is pending. If the arbitrators decide to give us equitable termination, they will do that and the contract will unwind in an orderly manner. In the meantime, we should not be at risk of BP cutting off its performance of this contract.

THE COURT: Thank you.

MR. BALBER: Your Honor, if this Court starts entertaining peace of mind injunctions every time a party is concerned that their counterparty is going to terminate the contract, the Court is going to need to hire more clerks because it is very often the case that parties have trepidation about their counterparty breaching a contract to terminate.

And that trepidation and the desire for peace of mind is not the kind of irreparable harm that warrants the jurisdiction of this Court.

And I'll go back to what I suggested earlier. In the event we seek to terminate, in the event we send a letter saying we're not performing, we're terminating, I will be back the same day, your Honor. And I'll get you a brief within 24 hours, and you can decide at that point.

But, your Honor, to do it now, based upon this whole set of speculative circumstances when we have a pending arbitration, is just a waste of everyone's time, your Honor.

MR. BURCHFIELD: Your Honor --

THE COURT: I'll hear you out.

MR. BURCHFIELD: Your Honor, New York UCC Section 2609.4 and 2610 specifically give us the right to seek assurances of performance if we are uncomfortable with their performance, if we have good grounds for discomfort. We have twice sought that assurance from BP, and BP has twice sought to provide it. That's a breach under New York law. It's a breach of -- and it's an anticipatory repudiation. We're not just standing here saying this might happen. They are already in breach of their obligations, and they failed to give us what the law allows. That's why we're seeking an injunction.

MR. BALBER: And that's why we're arbitrating, your Honor. That's exactly why we're arbitrating, because whether or not we breached, whether or not -- remember, we're the claimant. Whether they breached is a question the arbitrator is going to decide. And money damages will be awarded and somebody will pay somebody else. None of that bears on the question of whether this Court should entertain a preliminary injunction to prevent us to do something that we have no intention of doing.

THE COURT: What I want to do in the first instance is I'm going to ask you to get together and try and see if any agreement can be reached without the litigation in this court that, as defendant suggests, may be wasteful.

So I'm going to ask you to do that. I'm going to ask you to report back to me. I don't want to destroy your weekend, but let's say no later than Wednesday. You can do it earlier, if you want to do it, but by Wednesday I'd like a joint letter indicating whether some agreement can be reached that can give you the peace of mind you need to proceed with the arbitration without litigation that may indeed be wasteful.

In the event you tell me the answer is no, then I'm going to have defendants respond quickly. And I'd ask you to get together and talk about a briefing schedule; and if I think that a hearing is indeed warranted, what each side would want in the way of depositions.

And I believe, Mr. Burchfield, you've already spoken to a number of depositions you'd like to take, what, Mr. Balber, you think is necessary -- I know you don't think anything is necessary, but if we're to get to that and sort of the timing, realistic timing on a hearing.

But in the first instance I really want to see if you can work this out; if there's some language you can stipulate to that can give you the comfort you need to get through the arbitration, which is already kind of on its way. So why don't we do that.

If you think you would like assistance from the Court in any way, let me know, whether it's the magistrate judge, whether it's a mediator. Obviously you're welcome to hire a private mediator, but you'd have to bear the costs of that, or your clients would. Let me know that, and I'm happy to offer whatever services you think the Court can provide and in the most productive manner, all right?

So you'll get me a joint letter by Wednesday. And if it -- if not, I'll hear the defendants out in a prompt manner, and then I'll make a decision on whether we need to go forward with the hearing, okay?

MR. BURCHFIELD: Very well. Thank you, your Honor.

MR. BALBER: Thank you, Judge.

THE COURT: Is there anything else you'd like to say before we adjourn?

MR. BURCHFIELD: Just a clarification. If we do decide we would like assistance from the magistrate in reporting back to you on Wednesday, how would we go about doing that? I'm inclined to say yes, but I would like to consult with counsel about that.

THE COURT: Just let me know by letter. I think everything should be transparent and on the docket; not materials relevant with respect to settlement. But if you're amenable to that, and if you'd like a reference, just submit a letter to me. I'll make a reference right away. Judge Ellis is assigned to this case. I don't know his schedule offhand, but I'm happy to make the reference as soon as I can.

I personally am also happy to get involved, if you think that would be useful. That being said, it may be that I'm the one deciding a motion, so that may not be most prudent. But just let me know what together you think would be most productive, okay?

MR. BURCHFIELD: Thank you, your Honor.

THE COURT: Thanks. Have a nice weekend.

(Adjourned)